No. 47606-1

DIVISION TWO
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

*Appellant,*

v.

GARRETT THOMAS SYFRETT,

*Respondent*

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ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
Honorable Robert Lewis

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# BRIEF OF RESPONDENT

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## I. INTRODUCTION

In 2014, Respondent Garrett Syfrett (hereafter "Garrett") told law enforcement investigators that on one occasion over a decade earlier, when he was about 17 years old, he touched his 3 year old cousin's vagina. He was then charged with Child Molestation 1°. Garrett moved to dismiss the charge on the ground that there was insufficient independent evidence (evidence apart from his own incriminating statements) of the crime charged to satisfy the corpus delicti rule. Therefore, he contended that his statements were not admissible, and that without them there was insufficient evidence of the commission of any crime. The Superior Court agreed and dismissed the charge.

The child, E.S., was a teenager at the time Garrett's incriminating statements were investigated. E.S. told the investigating detective that she had no memory of any such incident. But the child's mother recalled that nine to ten years earlier, when she was 3 or 4 years old, E.S. had told her one day that *Gideon* Syfrett – the defendant's brother – "touched her potty." At that time the mother decided that nothing improper had occurred and that *Gideon* (not Garrett) had simply touched E.S. while helping her use the bathroom. The incident was completely forgotten until more than a decade later when Garrett Syfrett made a statement on an employment application that he had molested a child about 10-15 years earlier.

The State argued that the child's statement that "Gideon touched my potty" satisfied the corpus delicti rule. The Superior Court disagreed

ruling that the independent evidence (the evidence apart from the defendant's incriminating statements) was insufficient to show that *anyone* committed the crime of child molestation. RP 34. Although expressing some doubt about the admissibility of E.S.' hearsay statement, the trial judge assumed, hypothetically, that the statement "Gideon touched my potty" would be admissible. The judge further assumed that it did not matter that E.S.' statement referred to Gideon, the defendant's brother, and *not* to Garrett. RP 34. Declaring that he was drawing every possible inference in favor of the State, the Superior Court ruled that even construed in that light the evidence was still insufficient to establish the corpus delicti of the crime charged. RP 32-33. Accordingly, the Court below dismissed the charge of Child Molestation 1°. RP 34.

In this appeal, the State simply ignores the legal requirements of the corpus delicti rule. First, before the defendant's incriminating statements can be admitted, the State must present independent evidence of each element of the crime charged. In the Superior Court the State admitted that it would have a difficult time establishing the element of a purpose to achieve sexual gratification because "there are innocent explanations" for the child's statement. RP 27-28. Ignoring the Supreme Court's holding that independent evidence of every element of the crime charged is required,[1] the State argues that it only needed to present independent evidence that a touching of the child's genitals occurred.

[1] *State v. Dow,* 168 Wn.2d 243, 254, 227 P.3d 1278 (2010).

According to the State, even if the independent evidence shows only an innocent touching – such as touching while bathing a child, or touching while wiping a child that has just used the toilet – that the corpus delicti rule is satisfied. This is not the law and never has been.

Second, it has been firmly established for over a century that the corpus delicti rule requires independent proof of "two things. First, the existence of a certain act or result forming the basis of the criminal charge; and, second, the existence of criminal agency as the cause of this act or result."[2] The State simply ignores the second requirement. According to the State, independent evidence that establishes the criminal act – the act of touching a child's genitals – is sufficient *without* anything more. The State ignores the requirement that there must also be independent evidence that this act was caused by a criminal agency. Thus, under the State's theory, even if the touching was caused by a doctor who was merely conducting a physical examination, the corpus delicti of the crime would be established.

Third, the case law has long recognized that in order to satisfy the corpus delicti rule the independent evidence must negate the possibility that no crime occurred. If the independent evidence is equally susceptible to both the conclusion that (1) a crime was committed and (2) that no crime was committed, then the rule is not satisfied and the defendant's incriminating statements are not admissible.[3] The State simply ignores

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[2] *See, e.g., State v. Gates,* 28 Wash. 689, 695, 69 P. 385 (1902).

[3] *See, e.g., State v. Brockob,* 159 Wn.2d 311, 329, 150 P.3d 59 (2006).

this rule as well. In this case the Superior Court explicitly found that the independent evidence did not show that anyone committed the crime charged, and noted that when the independent evidence first came to light the child's own mother considered it and concluded that no one had committed any crime. RP 34, 45. Instead, she concluded that Gideon had simply helped the child use the toilet. RP 34.

The Superior Court ruled that the requirements of the corpus delicti rule were not met, that the defendant's incriminating statements were not admissible. Everyone agreed that without the defendant's statements the State's evidence was legally insufficient evidence to prove the charge. Consequently the Superior Court dismissed the charge. This Court should affirm the Superior Court's ruling and dismissal order.

## II. ISSUES ON APPEAL

### A. Statement of the Issue.

1. In a prosecution for Child Molestation, a crime that requires proof of "sexual contact" – a touching done for the purpose of achieving sexual gratification – does a three year old child's statement that her teenage cousin "touched my potty" satisfy the corpus delicti rule's requirement of independent evidence of a crime when the child's own mother interpreted this statement to mean that the teenage cousin helped the three year old to use the bathroom?

## III. COUNTERSTATEMENT OF THE CASE

### A. The evidence before the Superior Court.[4]

"As part of a pre-employment background check with the Pierce County Sheriff's Office, Garrett Syfrett checked a box that he had committed child molestation in the past." CP 4. A background investigator from the Sheriff's Office contacted Garrett[5] by telephone and Syfrett told the investigator "when he was in his late teens he put his hand down his cousin (Christine Syfrett) daughter's [E.S.] pants. He said he left it there for a second and then realized it was wrong and pulled his hand out. He told the investigator that he was 17-18 years old at the time and the victim, [E.S.] was 3-4 years old." CP 4. Syfrett told the investigator that the incident occurred between 2000 and 2002 at his parents' house in Camas, Washington. CP 4.

Garett made a similar admission to his friend, Patrick Morgan, who worked for the Renton Police Department. CP 4. Detective Bieber of the Camas Police Department interviewed Syfrett and he made a similar admission to her, stating that he placed his hand "inside her pants and underwear and touched her naked vagina with two fingers for a few seconds." CP 5. He told Detective Bieber that this "only happened once."

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[4] The following factual statements are taken from the Declaration of Probable Cause which is attached to the Motion and Declaration for Order Authorizing Issuance of Warrant of Arrest in this case. CP 4-6.

[5] In order to clearly distinguish between Garrett Syfrett and his brother Gideon Syfrett, the respondent and his brother are referred to in this brief by their first names.

CP 5. Garrett said "he could not remember for sure [if his brother Gideon had been present] but he might have been." CP 5.

Detective Bieber attempted to find corroboration for Syfrett's admission by interviewing the child and the child's mother. The child, E.S., "did not recall anything." CP 5. Bieber described her interview with the child's mother as follows:

> I contacted Christine Simpson, the victim [E.S.'s] mother. I explained to Christine that I was investigating an alleged sex crime against her daughter that was several years old. I asked if she was aware of anything happening to [E.S] and/or if [E.S] every [sic] disclosed sexual abuse by anyone. ***Christine told me she was not aware of any sexual abuse; however when [E.S.] was 3-4 years old she stated Gideon touched her potty.***

CP 5 (emphasis added).

Christine Simpson told Detective Bieber that Gideon was Garrett Syfrett's brother and that there had been a time when Denise Syfrett, the mother of Garrett and Gideon, had babysat E.S.:

> Christine explained her aunt, Denise Syfrett babysat [E.S.] and her brother, [J.S.] for about a year while Christine was in beauty school. Denise had four children; [B.S., H.S.], Garrett and Gideon. One day after Christine had picked [E.S.] and [J.S.] up from Denise's and they got back home, ***[E.S.] said "Gideon touched my potty."*** The statement was completely out of the blue.

CP 5 (emphasis added).

Christine Simpson told the detective that she did not tell her aunt Denise what E.S. had said, but she did discuss the matter with her own

mother, and they decided that Gideon (not Garrett) must have touched E.S. when helping her use the bathroom:

> Christine talked to her mom, Becky Syfrett . . . about the statement. ***Christine and Becky figured Gideon must have helped [E.S.] after she used the bathroom or something.*** Christine decided not to tell/ask Denise about the statement. After [E.S.] disclosed Gideon touched her, [E.S.] stopped playing with Gideon. Shortly after [E.S.] made the disclosure, Christine stopped using Denise as a babysitter and [E.S.] had little contact with Gideon or the other Syfrett children. I asked Christine when this would have occurred. Christine said she was in beauty school for about a year in 2004/2005, which is consistent with [E.S.] being 3-4 years old and she is now 13 years old.

CP 5 (emphasis added).

## B. April 17th Ruling of the Superior Court

The parties appeared before the Honorable Robert Lewis on April 17, 2015 and argued their respective positions on the defendant's motion to dismiss.

### 1. The Court rejected the State's contention that the independent evidence did not need to be admissible evidence. Instead, the Court *hypothetically assumed* that the child's hearsay statement would later be found to be admissible. On the basis of that hypothetical assumption, the Court then addressed the question of whether the child's hearsay statement satisfied the corpus delicti rule.

The only evidence that the State offered in an attempt to satisfy the corpus delicti rule was the hearsay statement of E.S. to her mother that "Gideon touched my potty." Judge Lewis identified the first issue as

whether that hearsay statement was admissible. RP 3.[6] The prosecutor argued that it didn't matter whether E.S.'s statement was admissible because even inadmissible evidence could satisfy the corpus delicti rule. RP 3. Judge Lewis expressed doubt as to whether that could possibly be the law:

> JUDGE LEWIS: Are you suggesting that the case that says if all you have is the Defendant's confession and no other admissible evidence, that the confession is admissible and sufficient proof of the corpus delicti? . . . What case is that?

RP 5. The prosecutor conceded he was unaware of any case that said that. RP 5.

Judge Lewis noted that first he needed to decide whether the child's hearsay statement to the mother was reliable before he could decide if it was admissible, and only if it was found admissible would it be possible to rule that it satisfied the corpus delicti rule:

> JUDGE LEWIS: Yeah. Well, isn't the way that we determine whether evidence is reliable is whether it's admissible? We generally don't admit unreliable evidence, and we generally admit reliable evidence. That's why we have the rules of evidence.

RP 6. The prosecutor responded with "the State's alternative position" that the child's statement was not hearsay at all, and therefore the Court

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[6] "I'm not sure I can rule on the admissibility of the statement by the Defendant for corpus delicti purposes until I know how I would rule on the 9 – I guess, 9A.44 issues on the child if – if I found those statements admissible, that might bear on whether his statement's admissible. If I found [the child's] statement inadmissible, then there doesn't appear to be sufficient evidence to admit his statement."

did not need to consider whether it was admissible hearsay that met the requirements of the statutory hearsay exception for "child sex hearsay." Judge Lewis responded by expressing doubt that the statement wasn't being offered for the truth of the matter asserted and asked if the State was standing by its argument that the evidence didn't have to be admissible in order to be considered for purposes of showing the corpus delicti of the crime. The prosecutor then backed off his position and seemed to concede that the evidence had to be admissible in order to be considered.

> MR VITASOVIC: Well, I guess the State's alternative position is that we don't necessarily need to clear the 9A.44.120 hurdle because of the fact that I don't know that it's necessarily hearsay because we're not introducing it for – to prove the truth of the matter asserted.
>
> JUDGE LEWIS: Okay. So what are you prove – offering it for?
>
> MR. VITASOVIC: Simply that there was a disclosure. It's circumstantial evidence.
>
> JUDGE LEWIS: Hmm. Okay. Well, go ahead and make your argument. I've indicated my position. I'm not – I guess, if you want it – if the State wants to stand on the ground that the evidence does not have to be admissible or have anything related – anything directly related to do with the case, then I guess I'll have to rule based on that understanding.
>
> MR. VITAVOSIC: Well. No, again. I mean – I don't – that doesn't sound like it's going to work out very well for me. Um – sorry – I mean –
>
> JUDGE LEWIS: Huh. I'd give – I'll give you the opportunity. You can point me to a case where inadmissible evidence was used to establish a corpus delicti where the Court said, "I – I'm using this to establish the

> corpus delicti even though it's inadmissible." I'll be glad to look at the case. I've been wrong before.
>
> MR. VITAVOSIC: Well, I guess I would defer to the Court then on how to proceed. And if we need to hash out a separate hearing on the admissibility of the statement whether it's under 9A.44.120 or whether it's some exception to the hearsay rule, that might be –

RP 6-7.

The Court then heard from Garrett Syfrett's attorney, who opined that he didn't think "there's any way that [the child's statement] would ever be admissible," even under RCW 9A.44.120. RP 8.[7] He also scoffed at the notion that the statement wasn't hearsay, noting that if the statement wasn't being offered for the truth of the matter asserted, as the prosecutor had just stated, then "that sounds like . . . a concession to me that there was no crime committed . . ." RP 9. Defense counsel ended by saying that he "left it to the Court how you wish to proceed." RP 8.

Judge Lewis declined to hold a hearing to consider whether the hearsay statement met the requirements of RCW 9A.44.120 because no such hearing had been noted for that day. RP 11. But he explained that in his mind the admissibility of the statement had to be established before it could be considered for purposes of establishing the corpus delicti:

> I always assumed evidence, not information, but evidence, independent of the court – confession. In other words,

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[7] "The statement that was made by this young girl at the time, she does not recall anything. She was – there's no proof, and there can't be this – this many years later that she was competent at the time to make the statement or to perceive what was going on. In the best case scenario, even if assuming the State somehow survives a 9A.44.120 challenge, all they have is the statement, 'Gideon touched my potty.' There's nothing else independent of that that would prove that there was a crime that occurred." RP 8.

> forget the confession for a bit, anything that was said in the confession. If it wasn't – a person walked in and you said, "Okay, I'm not going to tell you about the confession, but here's all the things that I have that indicate the crime of child molestation occurred." Is that evidence prima facie sufficient to show that a crime occurred and in some cases whether identity?[sic] . . . If there isn't enough, then the confession doesn't come in. And so my understanding of that – that rule is to make sure that we're not basing things solely upon confessions that may or may not be correct. We need to have some other information that indicates a crime occurred. . . .

RP 11-12.

Judge Lewis asked if there was agreement that the statement the child made was, "Gideon touched my potty." RP 12. Both parties agreed that was the statement she made. RP 13. *Without deciding* whether that statement was actually admissible, and simply assuming, hypothetically, that the Court would find it to be admissible at some later point in time, Judge Lewis asked the prosecutor how that statement would satisfy the corpus delicti rule:

> JUDGE LEWIS: Okay. That she walked into somebody, I guess the mother, and said "Gideon touched my potty," and everybody said, "Oh, okay – well, that's interesting" and that was the end of it.
>
> MR. PHELAN: That's correct.
>
> JUDGE LEWIS: Assuming that's the case, ***let's say that I find that that is admissible, how does that help you*** [addressing the prosecutor]?

RP 13 (emphasis added).

### 2. The Prosecutor argued that the corpus delicti for child molestation merely required evidence that someone touched the child's sexual organs.

The Prosecutor responded by arguing that the *only* thing he had to show in order to establish the corpus delicti was that someone touched the child's sexual organs. RP 13.

> So from the State's position, that is satisfied by a statement that says, "Someone touched my potty," which assuming the evidence in the light most favorable to the State, refers to sexual organs, and we have a touching. So it – it – from the State's position, it seems as simple as that. Doesn't seem to require in corpus that we prove the elements that – that are missing there such as sexual gratification, etcetera, just like with a homicide, you don't need to prove premeditation or any other things when you're dealing with corpus.

RP 14. The prosecutor also argued that he did not need to present independent evidence of the identity of the person who committed the crime, "you just need to establish that it was committed by someone." RP 15-16.

The Court asked questions about the meaning of the word "potty":

> JUDGE LEWIS: Okay. Would I need some additional information that the particular child uses the word "potty" to refer to sexual organs?
>
> MR. VITASOVIC: Well, I can –
>
> JUDGE LEWIS: Like a three-year old child could mean the "potty" is sexual organs, could be the potty that I have sitting in the bathroom and I call my vagina something else, or it could mean what comes out of me. So . . .

RP 16.

The prosecutor answered that the case law requires the court to draw all reasonable inferences from the evidence in the light most favorable to the State" and therefore it would be logical to "equate 'touch my potty' meaning possessive 'potty' belonging to that person as a sexual organ." RP 17.

Syfrett's defense counsel argued that even assuming the child's hearsay statement was admissible, it did not establish the corpus delicti because it failed to establish "sexual contact." RP 18.

> The corpus delicti clearly under [*State v.*] *Ray* and the cases cited is sexual contact, not just touching. There's no proof of sexual contact here. Your Honor talked about some of the illustrations that – about what the word quote "potty" can be. I've thrown others in there. Even assuming there was this type of touching that occurred, all the Court can surmise from the facts that are before you is that Gideon touched her "potty," whatever that might be at the time. And where it occurred, how it occurred, what was meant never, ever will there be any facts that will supplement what's before the Court. So . . .

RP 18-19.

Finally, defense counsel noted that the statement accused Gideon – not Garrett – of touching her potty:

> MR. PHELAN: . . . The allegation here is that Gideon did something. Whatever that was, Gideon did it – not Garrett, Gideon. There's no indication here that Gid – and again, throwing aside the confession which you're correct on, no indication –
>
> JUDGE LEWIS: If there was evidence that the person – that the child regularly mixed up Gideon and Garrett, would that change the analysis.
>
> MR. PHELAN: No.

> JUDGE LEWIS: Why not?
>
> MR. PHELAN: Because that's not before you, and there is no proof of that?
>
> JUDGE LEWIS: I didn't say that. I asked you whether hypothetically if there was evidence Gideon and Garrett got mixed up by the child all the time or they looked a lot alike or that sort of thing, would that be enough to change the analysis?
>
> MR. PHELAN: I don't think so. I think what you're stuck with is the actual identification of Gideon, not Gideon and Garrett. There's no proof before you that she ever confused those people.
>
> JUDGE LEWIS: Okay.

RP 19-20.

Defense counsel also argued that the corpus delicti "require[ed] proof of every element of the offense," and in this case, since sexual contact was an element, and since it was defined as a touching of the sexual organs for the purpose of sexual gratification, the prosecution had to present independent evidence that the touching was for sexual purposes. RP 21.

The prosecutor conceded that if he had to present independent evidence of "sexual contact" he probably couldn't do that because "there are innocent explanations" for touching a child's potty:

> MR. VITASOVIC: . . . I guess it just turns on the Court's reading of what the body of the crime is, because if the body of the crime for corpus on a child molestation first degree requires the proof of sexual contact, etcetera, I – ***I***

> ***would agree that we have a difficult time beating [[8]] that because we simply have a statement, "Gideon touched my potty" and it would require inferences from that, that it was for sexual gratification and there are innocent explanations to that.*** However, it's my position that the – that the standard outlined in *State v. Ray* [[9]]expressly does not require that. It simply – it says touching of the sexual organs. There's no mention of sexual contact, gratification at all when they expressly address what the corpus is, so I'm not sure where Defense is coming from with that . . . .

RP 27-28 (emphasis added).

Defense counsel responded that there was a passage in the *Ray* case that very clearly discussed sexual contact and the elements of the crime: "*Ray's* very clear that it requires sexual contact between the Defendant and the complaining witness." RP 30. Judge Lewis then took a brief recess so that he could read the *Ray* opinion. RP 30.

### 3. Assuming, without deciding, that the statement was admissible, Judge Lewis held that the child's statement was not enough to meet the requirements of the corpus delicti rule because "it was a description of innocent conduct."

After hearing all the arguments, Judge Lewis announced that he was going to rule without deciding whether the child's statement was actually admissible. Instead, he simply *assumed* admissibility and ruled that despite such hypothetical admissibility, the corpus delicti had not been shown. RP 27.

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[8] The transcript uses the word "beating" but it seems likely that the word actually spoken was "meeting."

[9] 130 Wn.2d 673, 926 P.2d 904 (1996).

After reading the *Ray* case during a brief recess, the hearing resumed and Judge Lewis announced that he had concluded that the defense "motion to dismiss should be granted." RP 31. Judge Lewis concluded that the child's statement ("Gideon touched my potty") was not considered to be a description of a crime by the people who heard and considered it when it was made, and that the statement did no more than describe what appeared to be innocent conduct:

> [I]t boils down to the effect of the statement, and for purposes of my analysis I find that the statement basically is that the child says to adults, apparently her mother at the age of three or four that Gideon, and I'll assume that she didn't necessarily identify the right person, touched my potty. That statement alone, in the circumstances in which the people heard it, heard it, is not enough. ***The people who heard the statement back then and the context in which they heard it led them to believe that it was a description of innocent conduct, that someone had helped her go to the bathroom and had assisted her in cleaning up after going to the bathroom. They did not perceive it to be a description of sexual contact, and there's no other evidence that indicates it was a description of sexual contact.*** So far that reason, it standing alone, would not be sufficient to show that sexual contact, as that term is defined, occurred. That being all of the evidence the State says they have, that is not enough to establish prima facie that the crime of molestation occurred. Therefore, the motion to dismiss is granted.

RP 33-34 (emphasis added).

Judge Lewis also made it clear that when making his decision, he did not consider the identity of the person who touched E.S.' "potty" to be part of the corpus delicti which the State had to present independent

evidence of. Therefore, he considered it irrelevant that E.S. named Gideon, rather than Garrett, as the person who did the touching.

> After carefully reviewing it, I find that the motion should be granted. There's insufficient evidence. In doing so, I do not find that it is an essential element of the corpus delicti in the crime of child molestation, that identity be established by independent evidence. That would be, I think too great a standard in those situations where a child could easily be confused or ambiguous as to what was going on or the evidence did not relate to corroboration. So just the fact there was an identification, or arguably a misidentification here, has nothing to do with the analysis I'm making.

RP 31-32.

Second, Judge Lewis clarified that he was drawing all reasonable inferences in favor of the State, and he was assuming, hypothetically, that all the evidence the State was offering was admissible, even though he had his doubts about that was actually correct:

> ***I'm treating the evidence that the State presented in a – the light most favorable to them***, that they could argue that while the child specifically identified someone that there was evidence to sug – suggest that misidentification was -- that identification was improper and that, in fact, another person committed the crime the child described. I'm also assuming that all of the corroborative evidence that the State says they could produce would be admissible although I have some doubts as to whether some of it is. ***Assuming it is all admissible, it is insufficient to prove that sexual contact occurred with someone.*** The opportunity of the Defendant to – to be around the child in question and their age differences without more would not be sufficient to establish any crime let alone the crime of child molestation. . . .

RP 32-33 (emphasis added).

## C. Denial of the State's reconsideration motion

The State filed a reconsideration motion and argued therein that the Superior Court was incorrect when it ruled that the independent evidence had to establish something more than the touching of the child's sexual organs. CP 35. The State asserted that the Court's ruling conflicted with *State v. Ray*, 130 Wn.2d 673, 679 (1996) because *Ray* "expressly states that in order to 'establish the corpus delicti of first degree child molestation, the State had to establish, independent of Defendant's confession, that touching of the sexual organs occurred." CP 35.

The trial court denied the motion for reconsideration noting, as he had previously noted, that when the child first said "Gideon touched my potty" everyone who considered that statement came to the conclusion that no sexual contact had occurred:

> In this particular factual situation, the Court sees that the only evidence which would support the corpus delicti are that the Defendant would have been around the person, had the opportunity to do it, and that the three year old involved in the case a number of years ago ***made a statement which was perceived by everybody that heard the statement as an expression of nonsexual contact with their sexual organs. And that was what was perceived back then,*** and it's a statement parenthetically of a per – about a person other than the Defendant. So I found that begiving [sic] – applying the standard from the numerous cases that we have, that the evidence that the State indicated they – they could present, presuming that it was all true, was not sufficient to establish a corpus delicti in this case, and I deny the motion to reconsider.

RP 44-45 (emphasis added).

## IV. ARGUMENT

### A. In *Dow* the Supreme Court held that the *corpus delicti* rule requires independent proof of "every element" of the crime charged. The State ignores this holding and relies on pre-*Dow* case law that is no longer good law.

"The purpose of the [corpus delicti] rule is to ensure that other evidence supports the defendant's statement and *satisfies the elements of the crime*." *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). "Historically, courts have grounded the rule in judicial mistrust of confessions." *Id.* "This distrust stems from the possibility that the confession may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual." *Corbett v. Bremerton*, 106 Wn.2d 569, 576-77, 723 P.2d 1135 (1986). Thus, "the rule prohibits convictions based upon confessions alone." *Dow,* at 249. The rule governs both the admissibility of the defendant's confession and the sufficiency of the independent corroborating evidence to support a conviction:

> The confession of a person . . . is *not sufficient* to establish the *corpus delicti*; but if there is *independent proof thereof*, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession.

*State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996), quoted in *Dow*, 168 Wn.2d at 252. *Accord State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006) ("[a] defendant's incriminating statement alone is not *sufficient* to establish that a crime took place.").

Washington State is "among a minority of courts that has declined to adopt a more relaxed [corpus delicti] rule used by federal courts." *Brockob*, at 328. As the Washington Supreme Court itself has explicitly acknowledged, it has repeatedly refused to follow this trend. *Aten*, 130 Wn.2d at 663; *Dow*, 168 Wn.2d at 252; *State v. Ray*, 130 Wn.2d 673, 678, 926 P.2d 904 (1996) ("this Court . . . has consistently declined to abandon the corpus delicti rule."). Under the federal corpus delicti rule "the independent evidence must only *tend to establish the trustworthiness* of the confession." *Dow*, 168 Wn.2d at 252; *Aten,* 130 Wn.2d at 663. But the Washington Supreme Court has continued to require more.

> In Washington:
>
> ***the State must still prove every element of the crime charged*** by evidence independent of the defendant's statement.

*Dow*, 168 Wn.2d at 254 (emphasis added). In the present case, the State simply refuses to acknowledge that *Dow* reaffirmed this requirement.

One of the elements of Child Molestation 1° is "sexual contact." RCW 9A.44.083. "Sexual contact" is statutorily defined as something *more* than mere contact with the sexual organs of another person. Under RCW 9A.44.010(2): "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." Thus, mere contact with the sexual organs of a child is *not* enough to show sexual contact and thus *not* enough to show that *any* crime has been committed. In *State v. French*, 157 Wn.2d 593, 610, 141 P.3d 54 (2006), the Court *rejected* the

contention that "the mental element of child molestation, acting 'for the purpose of sexual gratification,' is no longer an element of child molestation." On the contrary, the Court held that although the to-convict instruction for Child Molestation did not have to separately list the definition of sexual contact, the State still carried "its burden to prove a defendant 'acted for the purpose of sexual gratification' beyond a reasonable doubt. Sexual contact, an element of child molestation, therefore continues to require a showing of purpose of intent . . ." *Id.* at 610-611. *Accord State v. Stevens,* 158 Wn.2d 304, 309, 143 P.3d 817 (2006) ("In order to prove 'sexual contact' the State must establish the defendant acted with a purpose of sexual gratification.").

In the court below, the State conceded[10] that it had no independent proof of the element of sexual contact. Therefore, in an attempt to overcome this deficiency, the State simply ignores the unambiguous holding of *Dow* and asserts that the corpus delicti rule does not require it to present any independent evidence of this particular element of the crime charged. *Brief of Respondent*, at 13.

The State attempts to rely on a pre-*Dow* case for the proposition that in order to show the corpus delicti the prosecution need not present independent evidence of every element of the crime. *Brief of Appellant*, at 9-10. Ignoring the fact that it preceded the *Dow* decision, the State quotes from *State v. Angulo*, 148 Wn. App. 642, 200 P.3d 752 (2009), a 2-1

[10] "I would agree that we have a difficult time" establishing that element. RP 27-28.

decision that included a prescient dissent. *Angulo* does indeed contain language which criticizes an "overly element-based [corpus delicti] rule" and rejects the approach of "tying the corroboration requirement of the corpus delicti rule too closely to the elements of the charge." *Id.* at 658. The *Angulo* majority held that independent proof of the element of penetration was not required to prove the corpus delicti of child rape, because even if there was no proof of that element of the charged crime, the remaining independent proof showed there was reason to believe that a lesser crime (child molestation) had occurred, and that was good enough to make the defendant's confession admissible. *Id.* at 658-59.

As Judge Schultheis noted in his dissent, this holding was in conflict with the holding of *State v. Brockob,* 159 Wn.2d at 329, that "the corpus delicti rule requires the State to present evidence that is independent of the defendant's statement and that corroborates not just *a crime* but *the specific crime* with which the defendant has been charged." (Italics in original). Judge Schultheis also noted that this dilution of the *corpus delicti* rule was "inconsistent with established precedent." *Id.* at 658 (Schultheis, J., dissenting). He pointed out that in past child rape and "carnal knowledge of a child" cases, Washington appellate courts had consistently held that every element of that crime had to be independently established, ***including the element of penetration***:

> Just as evidence of death is required for the corpus delicti of homicide, sexual intercourse or penetration has been recognized as the sine qua non of rape – it is the body of the crime to which the term *corpus delicti* refers. *E.g.,* [*State v.*] *Meyer*, 37 Wash.2d [759,] at 763, 766, 226 P.2d

> 204 [(1951)]; *State v. Nieto*, 119 Wash. App. 157, 165, 79 P.3d 473 (2003) ("Under [the corpus delicti] rule, the court may not consider [the defendant's] alleged confession unless the State has established, through independent proof, that [the defendant] had intercourse with [the victim] before her sixteenth birthday."); *State v. C.D.W.*, 76 Wn. App. 761, 764, 887 P.2d 911 (1995) ("Because the confession was the only evidence of *one of the elements of child rape* – penetration – the confession was not admissible); *State v. Mathis*, 73 Wn. App. 341, 345, 869 P.2d 106 (1994) (identifying the corpus delicti of third degree child rape as "penetration of the 14-year-old child"); *State v. Thorne*, 43 Wash.2d 47, 59, 260 P.2d 331 (1953) (corpus delicti of the charged crime of carnal knowledge of an 8-year-old girl requires corroborating evidence of "sexual penetration, however slight"); see *State v. Clevenger*, 69 Wash.2d 136, 139, 417 P.2d 626 (1966) ("The corpus delicti of incest consists of (1) an act of sexual intercourse (2) between male and female persons within the prohibited degrees of relationship to each other."). Sexual intercourse or penetration is the certain act that forms the basis of the criminal charge. [Citation].

*Angulo,* 148 Wn. App. at 662-63 (Schultheis, J., dissenting) (italics in original). *Accord State v. Biles*, 73 Wn. App. 281, 285, 871 P.2d 159 (1994) ("The child's hearsay statements" complaining of genital pain "are sufficient to corroborate Mr. Biles' confession. They support the logical and reasonable inference *that penetration occurred, hence, there was sufficient evidence* of the corpus delicti.") (Italics added)..

The majority judges in *Angulo* disagreed, holding that although there wasn't any independent evidence of the element of penetration, that didn't matter because even without proof of that element there was independent proof of a lesser crime:

> Appellant contends that his confession was wrongly admitted into evidence due to his counsel's error because

> there was no independent proof of penetration, *the element distinguishing rape from molestation,* so the charged offense was never established. There is conflicting case law on both sides of that question. He argues that without independent proof of each *element* of the charged crime no confession can ever be admitted into evidence. We believe his argument is inconsistent with the history of the *corpus delicti* rule in this state and also is contrary to the purpose of the rule.

*Angulo*, 148 Wn. App. at 647-48 (italics in original).

Justice Schultheis failed to garner a majority of the panel for his position in *Angulo*, but ultimately his position carried the day in *State v. Dow*, *supra.* In *Dow* the defendant was charged with the rape of a three year old child. Although the defendant confessed to committing the offense there was no admissible corroborating evidence of the crime. The trial court ruled that the State failed to establish the corpus delicti of the crime and dismissed the charge. After an intervening decision of the Court of Appeals, the Supreme Court affirmed the trial court's dismissal, agreeing that the corpus delicti of the crime had not been established. The prosecution argued that enactment of a statue had effectively eliminated the traditional corroboration requirement of the corpus delicti rule, but the Court disagreed. The Court held that the statute had modified the rule regarding the admissibility of the defendant's confession, but that it had *not* modified the traditional rule regarding the *sufficiency* of the independent corroborating evidence:

> [W]e hold that any departure from the traditional corpus delicti rule under [the statute] pertains only to admissibility and not to the sufficiency of evidence required to support a conviction. ***The corpus delicti doctrine still exists to***

> ***review other evidence for sufficiency,*** i.e., corroboration of a confession. ***That is, the State must still prove every element of the crime charged by evidence independent of the defendant's statement.***

168 Wn.2d at 253-54 (emphasis added).

In sum, although Judge Schultheis lost the battle in *Angulo*, he won the war when his position prevailed in *State v. Dow*.[11] In the present case, the trial court correctly held that the prosecution was "required to prove every element of the crime charged by evidence independent of the defendant's statement." *Dow*, at 253-54. Since the State failed to do that, the trial court found the evidence legally insufficient to establish the corpus delicti and correctly dismissed the case.

[11] The State also seeks to rely on *State v. Burnette*, 78 Wn. App. 952, 904 P.2d 776 (1995). But *Burnette* is not on point. The charge in *Burnette* was felony murder. The elements of felony murder are killing a human being in the course of committing a felony. Thus the corpus delicti of felony murder only includes those two elements. The defendant in *Burnette* tried to persuade the Court that the elements of the underlying felony – in that case robbery – were also elements of felony murder, and that consequently the corpus delicti of felony murder includes independent proof of every element of the underlying felony. The *Burnette* Court properly rejected this argument. But the case at bar is not a prosecution for felony murder. This is a prosecution for Child Molestation, and sexual contact – contact with the intimate or sexual parts of the body for the purpose of stimulating sexual gratification -- is an element of that charge. Therefore, that element is a part of the corpus delicti of the crime charged.

**B. The *Ray* case does not help the State. There the Court found that the requirements of the corpus delicti rule were *not* met because the State did not have any independent evidence of any touching of the child. Therefore the Court reinstated the trial judge's ruling dismissing the case. Since the case was properly dismissed for failure to present independent evidence of the touching element, the Court had no reason to discuss the sufficiency of the State's independent evidence of the additional element of a purpose to achieve sexual gratification.**

The State argues that the *Ray* case supports its position, but it does not. The State studiously ignores the result of the *Ray* decision – which was to affirm a trial court ruling dismissing the charge of Child Molestation – preferring instead to pluck one sentence out of the *Ray* opinion and to misconstrue it.

The *Ray* Court summed up the independent evidence that the State presented in an attempt to corroborate the defendant's incriminating admission that he placed his daughter's hand on his penis:

> At approximately one in the morning, three year old L.R. came to her parents' bedroom and asked for a glass of water. Ray, probably nude, accompanied his daughter back to her room. Ray later returned to his room upset and crying. Ray awakened his wife and talked to her. His wife became upset and rushed to check on L.R. After further discussion with his wife, Ray, who was still upset, placed an emergency call to his sexual deviancy counselor.

*Ray*, 130 Wn.2d at 680.

In the following sentence the Supreme Court noted that to satisfy the corpus delicti rule the State had to present independent evidence of a touching of the sexual organs:

> To establish the corpus delicti of first degree child molestation, the State had to establish, independent of

> Defendant's confession, that touching of the sexual organs occurred between Defendant and L.R.

*Id.* at 679. This is an accurate statement of the law. But the State seeks to rely on it for more than it actually says. Significantly this sentence does *not* read:

> To establish the corpus delicti of first degree child molestation, the ***only thing that the*** State had to establish, independent of Defendant's confession, ***was*** that touching of the sexual organs occurred between Defendant and L.R.

(Bold italics added for illustrative purposes). And yet that is how the State urges this Court to read that sentence.

In *Ray* the Supreme Court held that the State had failed to establish the corpus delicti of the crime of Child Molestation because it had failed to establish that any touching of the sexual organs occurred. After summarizing all of the State's independent evidence the Court concluded:

> These facts suggest that *something* out of the ordinary occurred, but it is a leap in logic to conclude that any kind of criminal conduct occurred, let alone the specific conduct of first degree child molestation. Defendant's emergency call to his sexual deviancy therapist is inconclusive; one's placing an emergency call to a therapist shows that the patient is disturbed by something, but the unrest could be caused by unfulfilled urges, nightmares, or a subjective sense of guilt. [Citation omitted].
>
> The sparse facts surrounding Ray's getting a glass of water for his daughter fail to rule out Ray's criminality or innocence. [Citation]. Even though Ray speculatively could have molested L.R., and even though he had the opportunity to do so, ***the mere opportunity to commit a criminal act, standing alone, provides no proof that the defendant committed the criminal act.*** [Citation]. Without any evidence, direct or circumstantial, that Ray molested

> L.R., the State failed to establish the corpus delicti, and Ray's confession was properly excluded by the trial court.

*Ray*, 130 Wn.2d at 680-81 (bold italics added).

Since the independent evidence failed to establish the criminal act, the question simply never arose as to whether the act was caused by a purpose to achieve sexual gratification. Since the State failed to establish any touching occurred, the issue of what caused the touching was simply not present in the case. If the State *had* been able to present independent evidence of a sexual touching in the *Ray* case, such as evidence of the presence of semen or sperm on the child's hand or on the child's bedding, then the State would clearly have had the independent evidence to corroborate both the criminal act and the criminal agency that caused the act. But no such independent evidence existed.

In sum, the court below properly rejected the State's attempt to interpret the one sentence in *Ray* as if it held that there need not be any independent evidence that the touching was done for a sexual purpose.

### C. The corpus delicti rule has always required independent evidence of a "criminal agency," which means the independent evidence must show that the criminal act *had a criminal cause.* For Child Molestation, the required "criminal agency" or "criminal cause" is supplied by the element of a purpose to gratify sexual desire.

Washington's case law has always adhered scrupulously to the requirement that in order to satisfy the corpus delicti rule there must be independent proof to show not only a criminal act, but also a "criminal agency." *See State v. Meyer,* 37 Wn.2d 759, 763, 226 P.2d 204 (1951). *Meyer* held that "In order to establish the *corpus delicti* of any crime there

must be shown to have existed a certain act or result forming the basis of the criminal charge and ***the existence of a criminal agency as the cause*** of such act or result." *Id.* at 763 (emphasis added).

Virtually every case involving the corpus delicti rule recognizes this requirement of proof of a criminal agency or criminal cause. In homicide cases proof of the death of a human being is not enough; there must proof that the death had a criminal cause. *See, e.g., State v. Aten, supra*; *State v. Thompson*, 73 Wn. App. 654, 663, 870 P.2d 1022 (1994); *State v. Bernal*, 109 Wn. App. 150, 33 P.3d 1106 (2001). Similarly, in assault cases proof of infliction of an injury is not enough; there must be also be independent proof that the injury was caused by a criminal desire to inflict it, and not simply caused by accident. *See, e.g., State v. Baxter*, 134 Wn. App. 587, 596-98, 141 P.3d 92 (2006) (criminal agency shown for crime of second degree assault where "independent evidence showed . . . a 'fairly clean' circular incision" that was inconsistent with an accidental cut).

The corpus delicti rule requires independent evidence of criminal agency for all crimes. Thus, in a theft case, there must be proof that a loss of property was caused by a criminal agency. The mere fact that a large sum of money has gone missing is not sufficient to establish that a theft has occurred. But when there is independent evidence that checks for the same amount of money ($181,000) were drawn and made payable to the defendant, and were either cashed or endorsed by the defendant. Since the appellate court could not conceive of an innocent explanation for receipt

of this sum of money, it held that proof of a criminal cause had been presented and that the corpus delicti of theft was established. *State v. McConville*, 122 Wn. App. 640, 651, 94 P.3d 401 (2004).

But speculation cannot take the place of independent evidence, as the *Bernal* case illustrates. In that case there was evidence that victim died of a heroin overdose, and the defendant confessed that she delivered heroin to the victim the night before his body was discovered. But there was no independent evidence to corroborate the fact of the delivery of the heroin to the victim. This Court affirmed the dismissal of the charge of controlled substances homicide, holding that the Superior Court correctly ruled that the corpus delicti of the crime was not established because there was no independent proof of the delivery of the heroin which caused the death:

> Bernal does not dispute that the State produced evidence sufficient to support a finding that Reid's use of heroin resulted in his death. The remaining question is . . . Did the State produce evidence, independent of Bernal's statements, sufficient to support a finding that the heroin was delivered to Reid by someone else?
>
> The State did not produce such evidence. The record shows that Reid was found dead of a heroin overdose. Excepting Bernal's statement, the record shows absolutely nothing about how Reid acquired the heroin that caused his death. We can speculate that he acquired it by delivery, by stealing it, by finding it, or by some other means – but the record gives *no* rational basis for inferring one possibility over the others.
>
> According to the dissent it is simply speculation unsupported by evidence that Reid could have found or stolen the heroin. We agree entirely – but it is equally

> speculative to infer that Reid obtained the heroin by delivery. There is simply no evidence, independent of Bernal's statements from which to infer how Reid obtained heroin.
>
> Washington's corpus delicti rule has not been satisfied and the trial court correctly dismissed the case. Its judgment is affirmed.

*Bernal*, 109 Wn.2d at 154.

The same is true here. One can speculate that when E.S. said that "Gideon touched my potty" that she meant that someone touched her genitals. One can further speculate that she meant that someone touched her genitals for the purpose of achieving some sexual satisfaction. But this would be simply speculation. One can also speculate that someone touched her to help clean her genitals. Or that someone touched her while lifting her up onto a toilet seat. But it remains all speculation. There is no independent evidence of what the purpose of the touching was, and therefore here, as in *Bernal*, the trial judge correctly dismissed the case.

Even the later-overruled majority opinion in *Angulo* recognizes that the corpus delicti rule requires independent evidence to show criminal agency: "This case history establishes several points with respect to the Washington evidentiary *corpus delicti* rule. The rule requires proof of both a criminal act and a criminal agency or cause for the act." *Angulo*, 148 Wn. App. at 653, citing *Meyer*, 37 Wn.2d at 763. Moreover, the *Angulo* opinion discloses that the State *did* have independent evidence that there was not only a touching of the child's private parts, but a *sexual*

touching motivated by the defendant's purpose to achieve sexual gratification. The opinion notes that the child S.S. testified as follows:

> On at least two occasions during the summer of 2006, Mr. Lopez Angulo touched her in places she did not want to be touched. These events occurred on two different evenings after [her grandmother] had left for work.
>
> On the first occasion S.S. was asleep in her bed. She woke up to Mr. Lopez Angulo touching her both inside and outside of her pajamas. S.S. described the second incident as one involving Mr. Lopez Angulo "humping" or moving his hips up and down. He was not wearing any clothing and his private parts were "like a stick." They touched her privates.

*Angulo*, 148 Wn. App. at 646. On these facts the *Angulo* Court had no difficulty finding that independent evidence established both the criminal act (the touching) and the criminal agency (a criminal cause) for the touching. Clearly, since the defendant removed all his clothes, developed an erection, and "humped" the child by moving up and down, the touching of his penis to her privates was done for the purpose of gratifying sexual desire. And under the circumstances of the *Angulo* case, there was no available "innocent" explanation for the touching that occurred. There was no basis for contending that the child was being bathed, or medically treated, and no basis for arguing that the touchings were accidental. Since the child was asleep in her bed there was no innocent explanation for touching her at all.

Thus *Angulo* fully endorses and applies the requirement that independent evidence show a criminal agency or cause, as well as a criminal act. Nevertheless, the State refuses to recognize this criminal

agency requirement in this case. The State insists that *any* touching of the sexual organs of a child necessarily satisfies the corpus delicti rule, even if the touching has no criminal cause.

The State's refusal to acknowledge the need to present independent evidence of a criminal cause for the touching of sexual organs flies in the face of the legal definition of crime. Child Molestation requires proof of "sexual contact," and the definition of that term set out in RCW 9A.44.010(2) narrows the class of sexual-organ-touchings that can qualify for criminality. Innocent touching of a child's sexual organs – such as touching genitals while cleaning them during bathing, or wiping them after defecation or urination – do not fall within the definition of the crime. Such innocent touching is not caused by a desire to achieve sexual gratification. Such touches are caused by a desire to clean the body. Since these touchings are not caused by any criminal agency, there is no crime at all under these circumstances.

The State ignores the requirement of a criminal agency, and thus subscribes to a legal position that leads to absurd results. Both in the court below and in this court, the State argues that the only thing the corpus delicti rule requires is "independent evidence that supports a logical and reasonable inference that a touching of a victim's sexual organ occurred." *Brief of Appellant*, at 14; *accord* RP 14. If this position were accepted, then the corpus delicti rule would be satisfied every time a pediatrician touched a child's sexual organ. If a nurse testified that she saw the doctor touch a child's penis or vagina, that would be sufficient, even though the

observed touching was done in the course of a regular medical checkup.[12] Similarly, the corpus delicti rule would be satisfied whenever one parent testified that he or she saw the other parent touch a child's genitals while bathing the child.

Fortunately this is not the law. Proof of a criminal agency – a criminal cause – is required. Since no such proof was offered here, the corpus delicti rule was not satisfied and the case was properly dismissed.

**D. When evidence of a particular mental state merely determines the *degree* of the crime that has been committed – such as the degree of homicide – then the independent proof need not establish that mental state. But when proof of a mental state is necessary to distinguish between entirely innocent conduct, and criminal conduct (of whatever degree), independent proof of that mental state is required.**

The State argues that the corpus delicti rule does not require the presentation of independent evidence of the mental element of the crime charged. According to the State, it need only present independent evidence that some crime was committed, even if the crime established by

[12] In *State v. Acheson*, 48 Wn. App. 630, 740 P.2d 246 (1987) the defendant was convicted of indecent liberties with a minor, an offense which, like Child Molestation, requires proof of "sexual contact." The defendant made the incriminating statement that he had experienced sexual feelings while placing medication on the 4 year old child's vagina. In order to present independent evidence of "sexual contact" the State had to present evidence to negate the hypothesis of innocence – the hypothesis that the defendant was merely providing medical treatment to the child and had no intent to achieve any sexual gratification. The State satisfied the corpus delicti requirement by presenting testimony from the pediatrician who examined the child. The doctor observed that the child's hymen was extended and took a specimen from the vaginal cavity and when that specimen was examined a single sperm cell was found. *Id.* at 632. Based upon the clinical findings of a sperm cell, an extended hymen, and redness and irritation in the vaginal area inconsistent with self-stimulation, the Court of Appeals held "there was sufficient evidence of sexual abuse to establish the corpus delicti." *Id.* at 637.

the independent evidence isn't the same as the crime charged. This position is inconsistent with the unambiguous holding of *Dow* that the rule requires independent evidence of every element of the crime charged. It is also inconsistent with cases like *Brockob* where the Court held that the corpus delicti rule was not satisfied because the *specific* mens rea element was not established by the independent evidence. In *Brockob* one of the defendants was charged with possession of ephedrine with the intent to manufacture methamphetamine. The Court found the independent evidence "insufficient to support the inference that Brockob intended to manufacture methamphetamine." *Id* at 332. "The State's evidence only supported the inference that he intended to steal Sudafed, a misdemeanor offense." *Id.* Because the crime charged required proof of a mens rea of an intent to manufacture methamphetamine the State failed to satisfy the corpus delicti rule and his conviction was reversed. *Id.* at 333.

It is true that in *homicide* cases the courts have held that the corpus delicti rule does not require independent evidence of the mens rea element that determines the *degree* of the homicide offense. *State v. Hummel,* 165 Wn. App. 749, 763, 266 P.3d 269 (2012) (first degree murder). As long as there is proof of a death, and a causal connection between the death and a criminal act, the corpus delicti rule is satisfied. *See, e.g., State v. Burnette,* 78 Wn. App. 952, 956, 904 P.2d 776 (1995) (felony murder); *State v. Green,* 182 Wn. App. 133, 328 P.3d 988 (2014) (first degree manslaughter, where the independent evidence negated suicide and established that someone else shot the decedent between his eyes); *State v.*

*Thompson*, 73 Wn. App. 654, 870 P.2d 1022 (1994) (first degree murder). But the difference between homicide cases and child molestation cases is fairly obvious. In most homicide cases the mere presence of a dead body bearing a wound or other evidence of violent trauma quickly constitutes independent evidence that the victim's death was caused by some criminal agency. In many child molestation cases, however, the mere existence of independent evidence of a touching of a child's sexual body parts does not automatically establish a criminal cause for the touching, since many other innocent causes for such a touching are often readily apparent (such as bathing, dressing, medically examining the child, or assisting the child with the use of the toilet. Without additional evidence as to *why* the child's intimate body part was touched, it cannot be said that *any* crime at all was committed. Many such touchings simply are not criminal at all because they are not *sexual* in nature. That is why the crime is defined as one involving "sexual contact."

**E. Washington case law recognizes that evidence that a relative helped clean a small child's private parts is insufficient to prove that any crime was committed, because it fails to show that the relative acted with a purpose to achieve sexual gratification.**

Language in *State v. Johnson*, 96 Wn.2d 926, 639 P.2d 1332 (1982)[13] illustrates this point by acknowledging that a touching of a child's private parts while washing the child would not constitute a crime

[13] The portion of *Johnson* that rejected the appellant's double jeopardy multiple-punishment claim was later overruled by *State v. Calle*, 125 Wn.2d 769, 775, 888 P.2d 155 (1995).

at all. In *Johnson* the defendant was convicted of both indecent liberties[14] – which required proof of an intent to obtain sexual gratification – and statutory rape for separate acts committed against a five year old girl. Johnson was *not* a relative and was *not* exercising any child care-taking function. He "took the girl into the bathroom and washed her 'bottom' with a washcloth. Afterwards he had her perform fellatio on him." *Id.* at 927. Johnson argued that there was no crime of indecent liberties for "the incident where [he] wiped the child's genitals as there was no proof of sexual intent or state of mind indicating that defendant acted for purposes of his own sexual gratification." *Id.* The Court acknowledged that if that was all the evidence showed, he'd be right: "Standing alone such an incident would likely fail on that key element," but since the washing of the child's bottom was immediately followed by an act of fellatio "the sexual character" of the washcloth touching was "unmistakable," and thus intent to achieve sexual gratification was established. *Id.*

In contrast, in the present case, the independent evidence of the child's statement does not establish the corpus delicti because it reveals nothing about the intent of the person (be it Gideon or anyone else) who "touched her potty." Moreover, Gideon *was* a relative of the child, and thus was in a position to assist with child care-taking tasks such as helping his cousin go to the bathroom. *See also State v. Ramirez*, 46 Wn. App.

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[14] RCW 9A.44.100, the former indecent liberties statute, like the current Child Molestation statutes, required proof of a touching for the purpose of sexual gratification. *See Johnson*, 96 Wn.2d at 929 and RCW 9A.44.100(2) quoted there.

223, 226, 730 P.2d 98 (1986).[15] Therefore, this is not a case where the independent evidence simply fails to show what degree of Child Molestation took place; it is a case where the independent evidence fails to show that any crime at all took place.

**F. The corpus delicti rule is not satisfied if the independent proof is equally consistent with innocence and criminality.**

The "final test" of whether the corpus delicti rule has been satisfied is whether "the evidence independent of the confession prove[s] the nonexistence of any reasonable hypothesis of innocence." *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967), quoted in *State v. Aten*, 130 Wn.2d at 660. "In addition to corroborating a defendant's incriminating statement, the independent evidence 'must be consistent with guilt and inconsistent with a[ ] hypothesis of innocence.' *State v. Brockob,* 159 Wn.2d at 329, quoting *Aten*, 130 Wn.2d at 660, and quoting *Lung*, 70 Wn.2d at 571. "If the independent evidence supports 'reasonable and logical inferences of both criminal agency and noncriminal cause,' it is insufficient to corroborate a defendant's admission of guilt.'" *Brockob* at 329, quoting *Aten*, at 660.

The failure to disprove an innocent hypothesis led the court to hold that the confession of defendant Cobabe – one of the three defendants whose cases were consolidated in *Brockob* – should not have been

[15] "Where an adult ***unrelated*** male, ***with no caretaking function***, is proven to have touched the 'sexual or intimate' parts of a little girl, RCW 9A.44.100, the jury may infer from that proof that the touching was for the purpose of sexual gratification." (Emphasis added).

admitted because the corpus delicti rule was not satisfied. Cobabe was charged with attempted robbery in the second degree. Robbery requires an intent to take property against the will of the owner. Although the independent evidence established that Cobabe tried to take property from another person, there was also evidence that that supported the inference that Cobabe had the owner's permission to take it. *Brockob*, 159 Wn.2d at 334. The Court "conclude[d] the independent evidence was insufficient to corroborate Cobabe's incriminating statement under the corpus delicti rule because the independent evidence supports hypotheses of both guilt and innocence." *Id.* at 335.[16]

In *Aten* the defendant confessed to suffocating an infant to death. The independent evidence showed that the child died from some kind of acute respiratory failure. Suffocation could cause such a respiratory failure, but so could SIDS (Sudden Infant Death Syndrome). Since "the diagnosis of SIDS as the cause of death . . . [was] inconsistent with a conclusion that the infant died as a result of a criminal act" committed by Aten, the Supreme Court held there was "insufficient evidence independent of [Aten's] statements to establish the corpus delicti." *Aten*, at 661-662.

Similarly, in the case at bar, the independent evidence does not prove the nonexistence of any reasonable hypothesis of innocence. As the

[16] Cobabe's conviction was affirmed notwithstanding violation of the corpus delicti rule because even without his confession there was abundant evidence of his guilt. *Id.* at 353.

trial court judge noted, the statement "he touched my potty" is consistent with the hypothesis "that someone helped her [E.S.] go to the bathroom and assisted her in cleaning up after going to the bathroom." RP 34. It is consistent with merely assisting with personal hygiene, such as touching the child's genitals while wiping them with toilet paper. And as the trial judge noted, it is also consistent merely with touching the toilet equipment that a child uses when going to the bathroom, since many children refer to their child-sized toilet seats as "their potty." RP 16.

Since the independent corroborating evidence was not inconsistent with innocence, and since it was in fact interpreted as merely the reporting of innocent conduct by the child's mother, the trial court judge's ruling finding insufficient evidence to comply with the corpus delicti rule was entirely correct and must be affirmed.

**G. The Superior Court's dismissal ruling can easily be affirmed on the alternate ground that the proffered independent evidence – the child's statement – was not admissible. Since the child's hearsay statement was not admissible, there was absolutely no independent evidence to show that any crime was committed by anyone.**

A trial court's decision can be affirmed upon any ground within the pleading and the proof. In this case, the State never demonstrated that the child's hearsay statement ("Gideon touched my potty") was admissible. The trial court judge never ruled that it was admissible. On the contrary, he expressed some skepticism on this point. RP 32 ("I have some doubts"). Instead, the judge merely assumed hypothetically that the

State would somehow be able to convince the court that this evidence was admissible.

If the hearsay statement is not admissible then the State has absolutely nothing to offer in the way of independent evidence that a crime was committed. It would seem extremely doubtful that the child's statement could be found admissible under RCW 9A.44.120 because to be admitted under that statute the Superior Court would have to find that the statement bore "indicia of reliability." Since the statement is that *Gideon* touched her potty, it is virtually impossible to conclude that this statement is reliable and trustworthy and should be admitted as evidence against *Garrett*. The hypothesis that the child was mistaken, and meant to say Garrett when she said Gideon, concedes the fact that the statement is *not* reliable. And since the State *must* take the position that the child *misidentified* the person who "touched her potty," there is no basis for concluding that the "real" person who actually "touched her potty" was Garrett. It could just as easily have been one of E.S.'s other cousins, or siblings, or her mother.

Thus, in the unlikely event that the Court were to find the "Gideon touched my potty" statement does satisfy the corpus delicti rule, the Respondent asks this Court to affirm the dismissal below on the alternate ground that this statement is not an admissible hearsay statement, and therefore is not available as independent evidence which can be offered to prove the corpus delicti.

## V. CONCLUSION

The Washington Supreme Court has repeatedly held that child sex abuse prosecutions must satisfy the corpus delicti rule. In three cases the Court has held that the requirements of the rule were not met and has ordered the charges dismissed: *State v. Dow, State v. Ray*, and *State v. Meyer*. The Superior Court faithfully and correctly followed the rules laid down in these cases and dismissed the criminal charge because the proffered independent evidence (1) did not show the element of a purpose to achieve sexual gratification; (2) did not show the existence of a criminal agency or cause; and (3) was as consistent with the innocent act of assisting a child to use the toilet as it was with a criminal act. For all three of these reasons, Respondent Syfrett asks this Court to affirm the dismissal order entered below by Judge Lewis.

Respectfully submitted this 19th day of November, 2015.

**CARNEY BADLEY SPELLMAN, P.S.**

By _____
James E. Lobsenz WSBA #8787
*Attorneys for Respondent Syfrett*

## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I am over the age of 18 years, and competent to be a witness herein. On November 19, 2015, I served a true and correct copy of the following document:

**BRIEF OF RESPONDENT**

on the following attorney of record VIA E-MAIL and US MAIL:

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Deborah A. Groth, Legal Assistant

# CARNEY BADLEY SPELLMAN

## November 19, 2015 - 11:11 AM

**Transmittal Letter**

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